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Nos. 86-495, 86-624 and 86-625

IN THE

Supreme Court of the United States

October Term, 1987

K MART CORPORATION;
47TH STREET PHOTO, INC.;
and THE UNITED STATES OF AMERICA,
Petitioners,

v.

CARTIER, INC., CHARLES OF THE RITZ GROUP, LTD., and COALITION TO PRESERVE THE INTEGRITY OF AMERICAN TRADEMARKS,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF AMICUS CURIAE FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON REARGUMENT

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MOTION OF AMICUS CURIAE FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The American Free Trade Association moves for leave to file, in advance of the reargument of this case on the merits, the supplemental amicus curiae brief that accompanies this motion. The brief comments on certain of the arguments advanced in Respondents' supplemental brief of April 4, 1988, and provides additional evidence of Congressional intent. Because of the shortness of time, the American Free Trade Association has not sought consent of the parties to the filing of this supplemental amicus curiae brief. The parties had previously consented formally to the filing of amicus briefs by the American Free Trade Association in support of

the Petitions for Certiorari and in support of Petitioners on the merits.

Respectfully submitted,

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April 12, 1988

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON REARGUMENT

INTRODUCTION AND SUMMARY

The American Free Trade Association respectfully submits this brief as amicus curiae in support of Petitioners. This brief supplements the Association's brief on the merits filed on February 20, 1987, which included a statement on its interest as amicus curiae and a statement of the case.[1] In the interest of brevity, these statements are not repeated here.

1. Since that amicus curiae brief was filed, the American Free Trade Association has increased its membership and now includes retailers as well as importers, distributors and wholesalers of parallel imports.

The principal purpose of this brief is to comment on certain of the arguments advanced in Respondents' supplemental brief filed on April 4, 1988, and to add a new perspective on the policy arguments already advanced.

In their supplemental brief, Respondents in effect ask the Court to allow them to set the resale price of their products in the United States after they have sold those products on the open market in other countries. In 1975, Congress faced the same policy issue in the context of domestic trade and concluded that resale price maintenance was bad for consumers. Respondents' "free rider" argument was specifically rejected. Respondents' arguments are no more valid now in the context of international trade than they were in 1975 in the context of domestic trade.

ARGUMENT

IN 1975 CONGRESS FACED THE KEY POLICY ISSUE INVOLVED IN THIS CASE AND CONCLUDED THAT RESALE PRICE MAINTENANCE, WHICH IS WHAT RESPONDENTS ARE SEEKING HERE, WAS NOT IN THE PUBLIC INTEREST

In their supplemental brief, Respondents are essentially asking the Court to allow them to set the resale price of their products in the United States after they have sold those products, presumably at a profit, on the open market in other countries. Respondents' policy argument for this price-fixing scheme is that competition from their own products, independently imported, "erodes the trademark owner's investment in goodwill because the gray-market seller takes a free ride on the expenditures for advertising, promotion, and pre-sale

and post-sale services that produce the goodwill . . . ."[2] (Respondents' Supplemental Br. 8-9) Respondents cite for this proposition the Report of the House Committee on the bill that became the Lanham Trademark Act of 1945. (The reference itself is entirely inappropriate, since the Committee was referring to competition from similar products made by others, not from products made by the trademark holder itself.)

In 1975, Congress faced the same policy issue, in the context of domestic trade, and rejected Respondents' "free-rider" argument explicitly. Earlier in this century a number of states had enacted so-called "fair trade" statutes requiring retailers to re-sell products at minimum prices fixed by the manufacturers, and statutory exemptions from Federal antitrust laws permitted this practice. Miller-Tydings Fair Trade Amendment, August 17, 1937, ch. 690, Title VIII, 50 Stat. 693; McGuire Act, July 14, 1952, ch. 745, §2, 66 Stat. 632. Price competition with respect to these products at the retail level was precluded.

After several decades of experience with such price-fixing, Congress repealed the antitrust exemptions, thereby effectively repealing the state laws. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975). The reason for repeal was that resale price maintenance was bad for consumers. As Senator Brooke

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2. Contrary to Respondents' implication (Respondents' Supplemental Br. 7), only genuine products are at issue here. In most instances, parallel imports are manufactured in the same plants as the "authorized" imports, and in all cases (by the very terms of the Customs regulation at issue here) the manufacturer has placed, or authorized the placement of, its trademark on them just as it has on the "authorized" imports. Obviously, if parallel imports were not equally satisfactory to American consumers, they would not sell in such large quantities and COPIAT would not be interested in outlawing them. Even if the products were different, nothing is more deceptive and confusing to consumers than to advertise and promote one's trademark worldwide as if the products were identical and then to produce them in different forms.

stated: "Fair trade is legalized price fixing by which the owner of a brand name or trademarked article determines the price fixed by the retail merchant." 121 Cong. Rec. 38049 (1975). And Representative Heinz said,

> Rather than insuring fair trade practices, however, the fair trade laws have stifled competition, encouraged price fixing, increased costs to the consumer, and have generally denied the public the benefits of competition at the retail level.

121 Cong. Rec. 23661 (1975).

Proponents of "fair trade" resale price maintenance made the same policy argument that COPIAT makes in its Supplemental Brief about the "free ride" the parallel import seller takes on the manufacturers' "good will investment" in their trademarks. Yet, in 1975, while approving repeal of "fair trade," the House Judiciary Committee (the successor to the very committee which Respondents cite) explicitly addressed the "good will investment" argument and rejected it:

> Another justification for "fair trade" laws advanced by the manufacturers is that it protects their "good will" investment in their trademarks — namely, their advertising budgets. It is contended that the manufacturer's investment in promotion and advertising represents an asset — the "market image" of the product — which would be destroyed if the price premium which was part of that "image" could be eliminated by intrabrand price competition at the retail level.

Chairman Lewis Engman of the Federal Trade Commission responded to this argument in his testimony before the Subcommittee:

> 'This argument reveals the anticompetitive essence of the fair trade laws. Simply put, the argument assumes an identity between cost and value and thereby begs the question of the competitive marketplace by denying the consumer the right to assign his own value to the intangible asset of trademark or image.'

> The Committee was of the view that manufacturers should not be able to insulate their advertising budgets from the effects of intrabrand competition in this fashion, and that the marketplace should be allowed to judge the value of a "brand image" without the restraints imposed by resale price maintenance.

H.R. Rep. No. 341, 94th Cong., 1st Sess. 5 (1975).

Respondents' arguments are no more valid now in the context of international trade than they were in 1975 in the context of domestic trade. In neither case should manufacturers be permitted to fix minimum resale prices on their products once they have sold them, presumably at a profit, on the open market. In neither case should the American consumer be deprived of the benefits of price competition.[3]

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3. United States independent importers, distributors, and retailers testified in factual and theoretical detail to the pro-consumer effects of parallel importation in *Hearings on Gray Market Imports Before the International Trade Subcomm. of the Senate Finance Comm. on S.490*, 99th Cong., 2nd Sess. (1986). *See id.* at 1-2 (statement of Senator William V. Roth, Jr.); 2-3 (statement of Senator John H. Chafee); 5-6 (statement of Senator Warren B. Rudman); 40-43 (statement of James C. Tuttle); 56-59 (statement of Stephen Kurzman); 85,93 (statement of Edward T. Borda); 116-119 (statement of Nathan Lewin). The hearings were held in 1986 to consider S.2614, a bill which in substance would have restated what amicus curiae believes Congress intended in the original enactment of Section 526. When a similar measure was offered as an amendment to the current international trade bill, H.R. 3, on May 7, 1987, a majority of the Senate Finance Committee rejected the amendment, as Respondent notes. (Respondents' Supplemental Brief, fn. 5.) However, Respondents fail to note that,

Indeed, it is the members of COPIAT themselves who have established the economic incentive for parallel imports by setting dual world prices, with higher prices for American consumers. It would be particularly anomalous as a matter of economic and public policy to allow companies which manufacture overseas to fix discriminatorily high prices on their products for resale to American consumers when the Congress has prohibited companies which manufacture in the United States from doing so.[4]

NOTES (*Continued*)

on a number of recent occasions, the Committee has explicitly stated its intent not to take any action with regard to parallel importation while the litigation challenging the Customs regulation, including this case, remains pending. *See, e.g.*, S. Rep. No. 470, 98th Cong., 2nd Sess. 7-8 (1984) (the Senate Finance Committee report on the bill authorizing appropriations for the Customs Service); S. Rep. No. 71, 100th Cong., 1st Sess. 130 (1987) and H.R. Rep. No. 40, 100th Cong., 1st Sess. 158 (1987) (the House Ways & Means and Senate Finance Committee reports on the trade bill, H.R. 3).

4. COPIAT also claims that there are consumer deception problems with parallel imports (Respondents' Supplemental Br. 6-7). The staff of the Federal Trade Commission, the principal Federal consumer protection agency, disagrees. Their recent study of parallel imports concludes that there are no warranty or consumer deception problems with parallel imports, and, if there were any, there is ample existing authority at the Federal level to redress them. *Comments of the Bureaus of Competition, Consumer Protection and Economics of the Federal Trade Commission on Gray Market Policy Options Facing the United States Customs Service* (October 17, 1986), reprinted at 133 Cong. Rec. S5525 (1987). Moreover, states such as New York have enacted laws requiring prominent disclosure to consumers as to, among other things, warranty protection which accompanies parallel imports. *See, e.g.*, General Business Law §218-aa (McKinney's Supp. 1988).

CONCLUSION

Respondents are seeking to have the U.S. Government, through the Customs Service, now enforce in international trade a form of monopolistic price-fixing that has long been outlawed in domestic trade in this country.

Respectfully submitted,

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